



(4)
No. 695

IN THE

Supreme Court of the United States

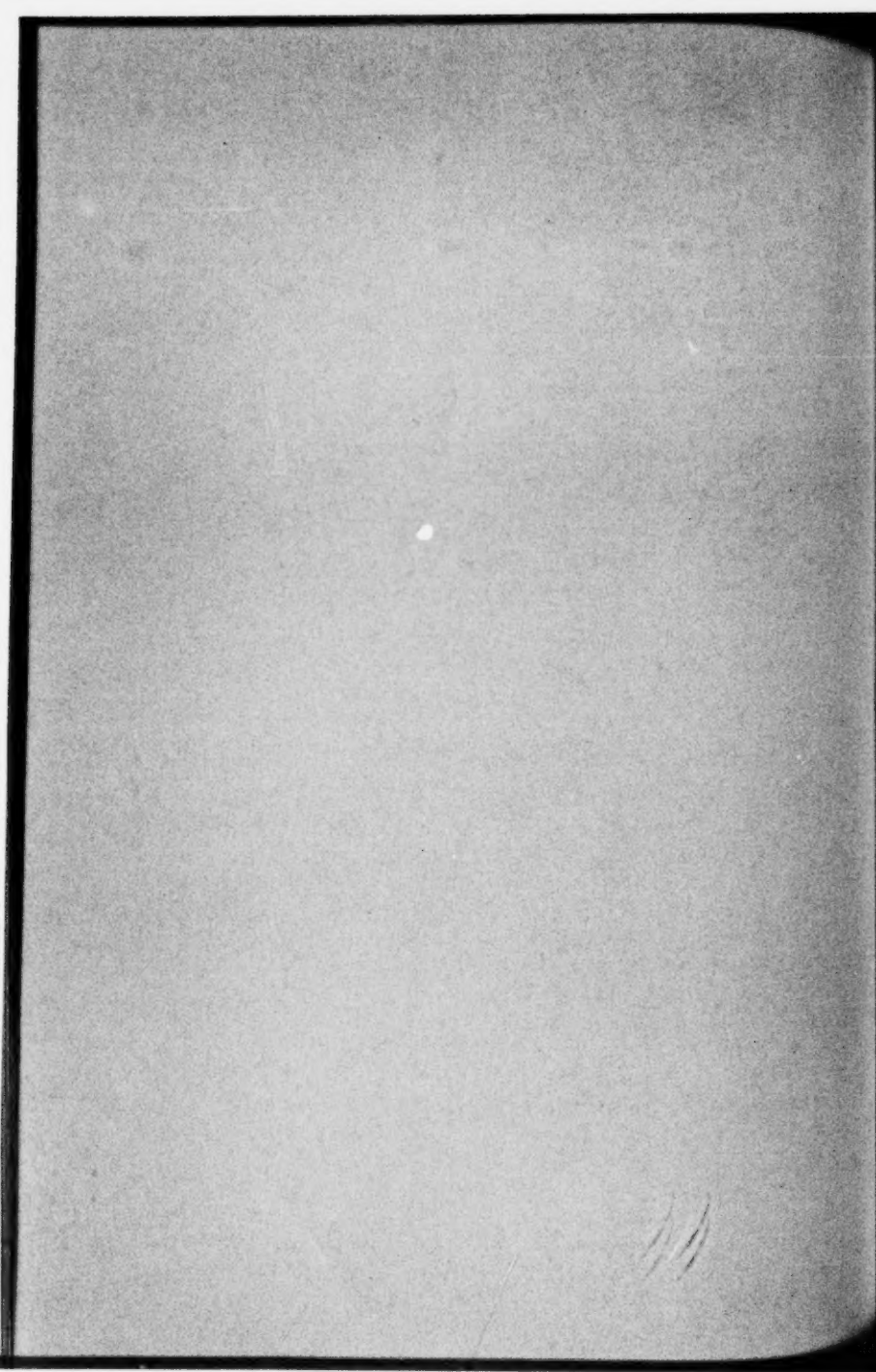
October Term, 1942

UNITED STATES OF AMERICA, Petitioner

v.

THE FIRST NATIONAL BANK,
Albuquerque, New Mexico, a Corporation

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI



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OBJECTIONS TO STATEMENT OF QUESTION
PRESENTED AND STATEMENT OF THE FACTS

The respondent deems it unnecessary at this stage in the proceeding to attack the petitioner's statement of facts. It believes that the statements in the petition and the opinion below sufficiently illuminate the question here presented but respectfully reserves the right to correct inaccuracies or omissions upon plenary argument if that should become necessary. However, it should be noted that the form of words adopted in stating the "Question Presented," viz: "upon which the payee's endorsement was forged" (Petition p. 2) is obviously inaccurate and question-begging.

PETITIONER'S REASONS FOR GRANTING WRIT

Petitioner has advanced three reasons for the issuance of certiorari here, as follows:

(1) Conflict with *U. S. v. National Exchange Bank of Providence*, 214 U. S. 302, and with *U. S. v. Onondaga County Savings Bank*, 64 F. 703, and apparently also with *U. S. v. Canal Bank & Trust Co.*, 29 F. S. 605 (E. D. La.) and *U. S. v. National City Bank*, 28 F. S. 144 (S.D.N.Y.)

(2) Conflict with *District National Bank v. Washington Loan & Trust Co.*, 65 F. (2) 831.

(3) Substantial importance of the question and apparent conflict of decisions upon it.

From the foregoing summary, it can be seen that the sole basis upon which certiorari is sought is a supposed conflict of decisions upon the question. If no real conflict exists, the petition should be denied. The respondent respectfully submits that an examination of the authorities will show not a conflict but rather an unusual degree of unanimity in cases of the present type. Without exception, all cases which *expressly* deal with the problem here presented support the Circuit Court's decision in this cause. To give an appearance of conflict, the petitioner has placed reliance upon cases readily distinguishable on their facts or upon cases where the decision was made without adversion to and in apparent ignorance of the settled legal principles which required the District Court's decision.

ARGUMENT

THERE IS NO SUBSTANTIAL CONFLICT UPON THE APPLICABILITY OF THE IMPOSTOR RULE TO THE PRESENT CASE.

A. The petitioner's argument concedes that if the impostor rule is good law, and if it applies to negotiable instruments of the United States, the Circuit Court's decision is

correct. Accordingly, a determination of the authorities upon the impostor rule and upon its applicability to paper of the United States will virtually dispose of the present petition.

The impostor rule has been thus stated by the Tenth Circuit Court in its opinion below, quoting from its own decision in *U. S. v. First National Bank of Prague*, 124 F. (2) 484, 486-7:

“The impostor or fraudulent impersonation rule has been frequently considered in its application to a variety of facts. With few exceptions it is held that the drawer of a check, bill of exchange or other negotiable instrument, cannot recover from an intermediary bank on its endorsement, or from the payee bank upon its payment, where the check, bill or other instrument is drawn and delivered to the impostor under the mistaken belief on the part of the drawer that he is the person whose name he has assumed and to whose order the check, bill, or other instrument is made payable, and the intermediary bank acquires it from the impostor upon his endorsement thereon of the name of the payee, or the payee bank pays it upon such endorsement, as the case may be. Although not in full accord in respect of the reasons for their conclusions most courts hold that while the drawer acts in the mistaken belief that the person with whom he deals either in person or by correspondence is the person whose name he has assumed and pretends to be, still it is the intent of the drawer to make the check, bill or other instrument payable to the identical person with whom he deals and therefore to be paid on his endorsement; and that accordingly payment to him or his endorsee merely effectuates the intent of the drawer.”

That the rule as thus stated is supported by overwhelming and unanimous authority is hardly debatable. Twenty cases were cited to the point by the Circuit Court in the *Prague* case and other authorities are numerous.

See Williston on Contracts, (Rev. Ed.) s. 1517B

Abel, The Impostor Payee, Wisconsin Law Review
Vol. 1940 pp. 161, 362

Annotations: 22 A.L.R. 1228
52 A.L.R. 1326
112 A.L.R. 1435

B. The decisions which deal expressly with the rights of the United States in the impostor rule situation are in accordance with the general rule above described.

U. S. v. First National Bank of Prague, 124 F. (2) 484
(C.C.A. 10)

That court specifically recognized the impostor rule as applicable and decided the case in favor of the United States only because the appellee bank's officers in that case had assisted in causing the loan check to be issued to the impostor in the first place.

Security-First National Bank v. U. S., 103 F. (2) 188
(C.C.A. 9)

U. S. v. First National Bank & Trust Co., 17 F. S. 611
(D. C. Okl.)

U. S. v. Citizens Union National Bank, 40 F. S. 609
(D. C. Ky.)

See also *U. S. v. National Exchange Bank*, 45 F. 163
(C. C. Wis.)

C. Not only the direct authorities just cited, but a further legal principle supported by authorities, which, so far as the respondent has been able to discover, are unanimous, support the Circuit Court's decision. As we have already pointed out the impostor rule is unshakeably established as a general principle applicable to the rights of private parties to commercial paper. Since this is true, it is applicable also to the rights of the United States on its commercial paper. For it is unquestionably the law that the rules of law affecting commercial paper apply to the United States and to commercial paper to which it is a party to the same extent as to the transactions of private persons.

The Floyd Acceptances, 7 Wall. 666,

"It must be taken as settled that when the United States becomes a party to what is called commercial paper . . . they are bound in any court, to whose jurisdiction they submit, by the same principles that govern individuals in their relations to such paper."

Cooke v. U. S., 91 U. S. 389

"It was conceded in the argument, that, when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court."

U. S. v. National Exchange Bank of Baltimore, 270 U. S. 527, 534-5

"The government attempts to escape from this conclusion . . . (that it could not recover money paid out on its own raised check to an innocent indorsee) . . . by the fact that the hand that drew and the hand that was to pay were not the same, and some language of Chief Justice White as to what it is reasonable to require the government to know in paying out millions of pension claims. The number of the present check was 48,218,587 . . . But the Chief Justice used that language only to fortify his conclusion that the United States could recover money paid upon a forged indorsement of a pension check. He cannot be understood to mean that great business houses are held to less responsibility than small ones. The United States does business on business terms . . . We are of the opinion that the United States is not excepted from the general rule by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt."

U. S. v. Guaranty Trust Co., 293 U. S. 340, 350

"As against the United States, the rights of a holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals."

D. We shall now consider the authorities cited by the petitioner as indicating a conflict of decisions.

U. S. v. National Exchange Bank of Providence, 214 U. S. 302, does not contain a sufficient recital of facts to determine whether a true impostor rule situation was presented. The entire decision is based upon the assumption that the payees' endorsements were forgeries (See Justice Holmes' reference to this point in *U. S. v. National Exchange Bank of Baltimore*, 270 U. S. 527, 534-5); and the decision is merely that the United States is not bound to know its payee's signatures under the doctrine of *Price v. Neal*. Compare *U. S. v Chase National Bank*, 252 U. S. 485. Since the doctrine of *Price v. Neal* really relates to the forgery of a *drawer's* signature, the rationale of this decision is doubly obscure. Moreover, not a word appears in the decision of the impostor rule and a study of it can leave no doubt, in spite of petitioner's 'assumption' to the contrary (Petition pp. 9-10) that the court was not addressing itself to the impostor rule problem if, indeed, one was presented. This decision cannot be regarded as indicating a substantial breach in the unanimity of decisions upon cases of the present type.

The *second* case relied upon by the petitioner as indicating a conflict of decisions is *U. S. v. Onondaga County Savings Bank*, 64. F. 703. This case is subject to the same criticism as the *National Exchange Bank* case just discussed. On its facts it may be inconsistent with the impostor rule, but this is not clear, and the opinion contains no reference to the impostor rule. The authority of both this case and of the *National Exchange Bank* case as applied to an impostor rule situation has been expressly denied upon facts essentially like those of the present case.

Security-First National Bank v. U. S., 103 F. (2) 188, 191

The *third* case relied upon by the petitioner in this connection is *U. S. v. Canal Bank & Trust Co.*, 29 F. S. 605 (E. D. La.) This case is really the only one squarely contrary to the Circuit Court's decision on its facts. But it contains no reference to the impostor rule nor indeed anything more per-

suasive than a mere declaration of the result reached. The court says that the payee-veteran truly entitled had not indorsed the check, that the indorsement was therefore a forgery, and concludes that the United States could recover. In support there are cited three cases which have nothing to do with the impostor rule. Clearly this District Court decision does not constitute of itself a substantial conflict with the array of authorities supporting the Circuit Court's decision here.

The *fourth* case cited by petitioner to show a conflict of decisions is *U. S. v. National City Bank*, 28 F. S. 144 (S. D. N. Y.). This case is obviously distinguishable from the ordinary impostor rule cases like the present. Like *U. S. v. First National Bank of Prague*, 124 F. (2) 484 (C.C.A. 10) it presents a situation where the defendant bank (or rather its correspondent) had first contributed to the imposture and aided in causing the government to issue the bonus loan check in the first place. This circumstance, of course, entirely changes the rights of the parties as shown by the difference in the Tenth Circuit Court's decisions in the *Prague* case and the case at bar.

The *last* of the cases cited to this point by the petitioner is *District National Bank v. Washington Loan & Trust Co.*, 65 F. (2) 831 (D. C. App.). This is relied upon not as relating to the rights of the United States on commercial paper but as contrary to the impostor rule and as being therefore in substantial conflict with decisions following the rule (Petition pp. 11-12). The merest perusal of the case should dispel this contention. The case may have started out to be an impostor rule case but it ended quite otherwise. The rationale of the decision is clearly that the cashing bank was not misled by the imposture as in the usual impostor payee cases, like the present one. The court expressly pointed out that

“The miscarriage in the present case . . . resulted from

the neglect of the . . . (cashing bank) . . . rather than the neglect of the . . . (drawer)."

The case is not at all inconsistent with the impostor rule and lends no support to the supposed existence of a conflict upon that rule.

CONCLUSION

Upon the above consideration of the authorities, respondent submits that the Circuit Court's decision is right, that it accords with the overwhelming weight of state and Federal authorities and that no substantial conflict of decisions exists which would require or justify the issuance of certiorari here. The petition should be denied.

Respectfully submitted,

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February, 1943.

